No. 21,816

In the

United States Court of Appeals

For the Ninth Circuit

United States of America, for the use and benefit of Chicago Bridge & Iron Company, an Illinois corporation,
Appellant,

vs.

Ets-Hokin Corporation, a California corporation, and The Travelers Indemnity Company, a Connecticut corporation,
Appellees.

Appellant's Opening Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

TEXTS

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I.

JURISDICTIONAL STATEMENT

The Order and Judgment of the United States District Court for the Northern District of California entered in consolidated cause Nos. 44430 and 44552 on December 30, 1966 (TR 130-139) is the subject matter of this appeal,

notice of which, together with a cost bond on appeal in the sum of $250.00 was filed on March 14, 1967 by Chicago Bridge & Iron Company (hereinafter referred to as CB&I) (TR 140, 141). A Designation of Contents of Record on Appeal and a Statement of Points were filed on March 14, 1967, and an order extending the time to docket the appeal to May 11, 1967 was secured on March 17, 1967. Accordingly, the appeal was docketed and the transcript of record filed in a timely manner. Jurisdiction of the District Court to hear and decide the consolidated cases is conferred by Sections 10 and 12 of the Federal Arbitration Act, Title 9, United States Code. The jurisdiction of this Court to determine this appeal is conferred by 28 USC Section 1291.

II.

STATEMENT OF THE CASE

Since this appeal has been consolidated with Appeal No. 21033 for Hearing before this Court by an order dated August 3, 1967, Appellant, in order to economize, hereby adopts the Statement of Facts set forth in its Opening Brief on file with the Court in Appeal No. 21033, adding thereto, however, the following pertinent facts.

The Order and Judgment appealed from herein is the Order, TR 130, and Judgment, TR 48, 49, of Judge Alfonso Zirpoli affirming an award of arbitrators entered on September 1, 1965, TR 125-128. The arbitration had been conducted and concluded pursuant to Appellee, Ets-Hokin's Demand for Arbitration, TR 33-35, and the order of the District Court for the District of Arizona, Judge Carl Muecke presiding, TR-36, granting said Appellee's Motion For Stay of Action Pending Arbitration dated August 20, 1964 (See Appeal No. 21033, Transcript of Record 6-18). The Motion requested a Stay of Appellant's Arizona District Court Action (see a copy of Appellant's original

Complaint, Appendix C) pending arbitration of the subcontract dispute in accordance with said Appellee's Demand for Arbitration dated August 14, 1964 under Paragraph 23 of the Subcontract, TR-21, between Appellant and Appellee, Ets-Hokin, dated August 22, 1962. The text of the Motion and Exhibits B and C thereto and Paragraph 23 of the Subcontract are reproduced in Appendix A herein for convenience of reference during the course of this Brief.

The proceedings in Cause Nos. 44430 and 44552 in the District Court below constitute an effort of the Appellant to have the Arbitration award vacated and set aside and an effort by the Appellee, Ets-Hokin, to have that award confirmed. Both efforts were based upon certain statutory provisions of Title 9 USCA, Sections 9, 10 and 11. The text of these sections is set forth in Appendix B of this Brief.

Briefly, the Appellant contended that the Arbitrators in making the award had exceeded their powers under Section 10(d) and, in addition, had either refused to hear evidence pertinent and material to the controversy, namely, the Appellant's analysis, TR 38-47, of the backcharges made by Appellee, Ets-Hokins, for prestressing, or having considered it, had materially miscalculated appropriate labor backcharges under Section 11(a) of the Federal Arbitration Act. The Appellees, Ets-Hokin Corp. and The Travelers Indemnity Company, sought judicial confirmation of the Arbitrators Award pursuant to Section 9 of the Federal Arbitration Act and Section 1285 of the California Code of Civil Procedure (see Appendix A and TR 116-118).

The District Court in its Order of December 30, 1966 found that the Arbitrators had not exceeded their powers in predicating their award upon matters outside of the writ-

ten Subcontract and that the Arbitrators did not miscalculate the backcharges since the conflicting evidence as to the backcharges was not before the Arbitrators in a verified form at the time they entered their Award.

III.

SPECIFICATIONS OF ERROR

The Order and Judgment of the United States District Court for the Northern District of California, the correctness of which Appellant submits to this Court for review, are in error as follows:

A. Specification of Error No. 1

The District Court erred in finding that the District Court of Arizona "merely" stayed proceedings in Appellant's lawsuit in that Court against Appellees "in accordance with the agreement of the parties", and did not restrict the issues submitted for arbitration.

B. Specification of Error No. 2

The District Court erred in finding that "the parties did not limit the issues to the Subcontract and the demand of August 14, 1964 . . .".

C. Specification of Error No. 3

The District Court erred in finding that the Arbitration Board had merely used the parol evidence of Appellant's offer in the contract negotiations to furnish a standby operator during prestressing operations to "clear up ambiguity" under paragraph 1(b) of the Subcontract agreement which provided for Appellant to install the spiral cases with test barrel and spider.

D. Specification of Error No. 4

The District Court erred in finding that the Arbitration Board did not improperly compute the Award or that

unverified evidence compels the Court to accept the calculations of the Board as final upon the state of the record.

SUMMARY OF ARGUMENT

It is well established that the power of an Arbitration Board to make awards is limited to the issues submitted to it for decision by the parties. *Wright Lumber Co. v. Herron* 199 F2d 446 (CA-10 1952); *Gaddis Mining Co. v. Continental Materials Co.* 196 F.S. 860, 867 (D.C. Wy. 1961); *Bierlein v. Johnson* 166 P2d 644 (California—1946). The principal issue submitted to the Arbitrators for decision was the question of whether Appellant in failing to perform the prestressing work defined in subparagraph 208(g) of the General Contract Specifications, breached or defaulted in its obligations under the Subcontract of August 22, 1962 between Appellant and Appellee, Ets-Hokin.

Under the paragraph 1(b) of the Subcontract, the Appellant was to install the Glen Canyon dam powerhouse turbine spiral cases together with a test barrel and spider. The Arbitration Board found that during the course of subcontract negotiations Appellee had made an oral offer to furnish a standby operator to maintain pressure during the prestressing of the spiral cases. The Board further found that this offer to furnish a standby operator was made by Appellant in order to induce the Appellee, Ets-Hokin to award it the subcontract which was then being negotiated. The Board then found that Appellant should be bound by its oral offer, even though the same was not accepted by the written Subcontract. Accordingly, the Board entered an Award which charged Appellant for one-half of the labor cost of a standby operator, having also found that the said operator would also be responsible for maintaining the proper temperature during the prestressing period, and that the obligation to maintain the correct temperature was not a part of the prestressing.

The decision of the Arbitrators imposed an obligation upon the Appellant which was not to be found in the written Subcontract or upon any reasonable interpretation of its terms, and accordingly constitutes the imposition upon Appellant of an obligation independent of and collateral to the Subcontract. The Appellant submits that the Arbitrators were not called upon to decide whether Appellant was guilty of the breach of an independent collateral "agreement", but only whether it was guilty of a breach of the written Subcontract, and that in making such a decision, they determined a matter not submitted to them, thereby exceeding their powers under Section 10(a) of the Federal Arbitration Act.

The lower court found that the parties had broadened the issues to be arbitrated to include the intent and understanding of the parties other than as set forth in the Subcontract of August 22, 1962. In addition, the lower court *appeared* to justify the Arbitrator's Award upon the grounds that it constituted no more than the finding of an implied covenant under the Subcontract dated August 22, 1962. The Appellant argues against the findings of the lower court upon the grounds that the court ignored Appellant's insistence throughout the proceedings upon the proper application of the parol evidence rule; that Appellant never consented to a broadening of the issues beyond the Subcontract of August 22, 1962; and that the findings of the Arbitration Board on their face and under the rules governing the creation of implied covenants, did not constitute the finding of an implied covenant under the Subcontract binding the Appellant to furnish a standby operator for prestressing.

Additionally, the Appellant argues against the summary dismissal by the Lower Court of Appellant's contention that the Award was defective under Section 10 or 11 of the Federal Arbitration Act, for the reason that the issue of

the proper amount of backcharges was properly before the Board; that the Board had committed itself to a resolution of the issue prior to making an Award; and that its failure to do so renders its Award defective since the discrepancies in payroll figures constituting the backcharges are real and not imaginary.

ARGUMENT

Specification of Error No. 1.

A. The District Court stayed proceedings before it pending arbitration only of those issues raised in the demand for arbitration.

The District Court of Arizona's minute entry for October 26, 1964, TR 36, sets forth the Order of that Court staying Appellant's action under the Miller Act, 40 USC 270, against Appellees, in the following language:

> "It is ordered that Defendant's Motion for Stay of Action pending arbitration is granted *only as to specific items raised in the motion,* subject to either party coming back to the court for relief by reason of any delay in such arbitration". (Emphasis added)

What were the "specific items raised in the motion"? The Motion for Stay of Action recited on its face in Paragraph 2 thereof that the lawsuit brought by Appellant involved "a dispute between the parties as to the interpretation of the subcontract" and that Appellee Ets-Hokin had, subsequent to the filing of the lawsuit, requested Appellant to arbitrate the dispute under Paragraph 23 of the subcontract. The Motion asked for a stay of the Appellant's action "until an arbitration shall be had in accordance with the terms of the subcontract entered into between" the Appellant and Appellee Ets-Hokin.

Appellee Ets-Hokin's letter demanding Arbitration, TR-33, refers to an arbitration of "the disputes hereinafter referred to" and then proceeds to outline six issues, the principal one of which was stated to be:

> "Whether Chicago Bridge & Iron Co. breached its obligations under the subcontract by failing and refusing to perform that portion of Item 79 of the Bidding Schedule for Specifications No. DC-5750 of the United States Government Contract No. 14-06-D-4429, described in Paragraph 208 of said Specification, namely, the cooling and prestressing of the Spiral cases for the turbine units, Nos. 1 through 8 of the power house at the Glen Canyon Dam Project, which work was a part of the said Subcontract." (TR-34).

The remaining issues were subsidiary and dependent upon the resolution of the above issue. Thus, when the District Court of Arizona stated that it was staying Appellant's lawsuit to permit arbitration of the specific items raised by the Appellee's Motion to Stay, the court was referring to the dispute between the parties as outlined in six parts by Appellee Ets-Hokin's demand letter of August 14, 1964.

To dismiss this limitation upon the arbitration proceedings by declaring that the arbitrators were not bound by it since their authority was derived from Article 23 of the Subcontract is to ignore the realities of the dispute between the parties.

Appellants did not wish to have their Miller Act rights determined by arbitration and strongly resisted Ets-Hokin's Motion For Stay of Action. It was Appellant's counsel who requested the District Court to limit the Stay of proceedings in the lawsuit for arbitration only of those issues raised by the Motion. Consequently, the underlined language in the Court's order cited above was added to the order in an effort to limit the scope of the arbitration. What the Court for the Northern District of California now appears to be saying is that the Arizona District Court does not have the power to restrict the scope of the arbitration. Appar-

ently, the District Court has the power to deny the Motion For Stay of Action, but not the power to limit or restrict the arbitration at the instance of one of the parties.

Further, the District Court for the Northern District found that since the Arizona District Court did not direct the parties to arbitrate, it did not, therefore, restrict the arbitrators authority. Such reasoning miscasts the issue of whether the arbitrators had the power to make the decision they made in this instance. It can be granted that the arbitrator's power to arbitrate is not derivative from the Court's fiat without concluding, thereupon, that therefore the arbitrators had the power to arbitrate any dispute or issue put to them by any *one* of the parties.

When it is remembered that Appellant resisted arbitration and would not have engaged in the arbitration at all without the Court's Order, it is nonsense to state that Appellant would have been obliged without further judicial action to arbitrate disputes not agreed to be arbitrated by it or included within the scope of the Court's Order. Appellant was obligated, under the Court's Order, to arbitrate only the issues referred to by the Court or such other issues as it agreed to arbitrate. Had Appellee Ets-Hokin wished to arbitrate issues not within the scope of the Court's Order or not agreed to by Appellant, it would have had to apply to the Court for a determination on the matter, unless it could have acquired the consent of the Appellant.

While Section 3 of the Federal Arbitration Act refers only to a stay of court proceedings pending arbitration, Section 4 of the Act provides for authority to compel parties to an arbitration agreement to arbitrate. Thus, had Appellant refused, after the Arizona District Court's Stay Order of October 26, 1964, to arbitrate the issues set forth in the Demand letter of August 14, 1964, Appellee Ets-Hokin could have proceeded under Section 4 of the Act to compel the

arbitration, and such action was no doubt contemplated by the last part of the Arizona Court's Order. Thus, the Arizona Court's Order, read in the light of Sections 3 and 4 of the Arbitration Act taken together, clearly constitutes a mandate, even if only implicit, that Appellant arbitrate the issues referred to in the Motion, i.e., the six issues set forth in the letter of August 14, 1964.

Finally, the Arizona Court's Stay order certainly can be construed as pertinent to a determination of the issues submitted to the arbitrators for decision. As decided by the Court in *American Almond Products Co. v. Consolidated Pecan Sales Co.* 144 F2d 448, 449 (2 Cir. 1944), the issue of whether the arbitrators exceeded their powers within the meaning of subdivision 10(d) of the Arbitration Act depends upon whether the submission of issues to arbitration admits of or requires the arbitrators to decide whether, upon grounds other than the terms and provisions of the written Subcontract, Appellant was required to perform the prestressing of the spiral cases. Certainly, as of the date of the Arizona District Court's Stay Order of October 26, 1964, no such consideration was required of the Arbitrators. The issue at that time was strictly: Did the written Subcontract of August 22, 1962 require the Appellant to perform the prestressing work as described in subparagraph 208(g) of the General Contract Specifications? In Staying the Appellant's civil action before it, the Arizona Court implicitly decided that this issue was referable to arbitration under Paragraph 23 of the said Subcontract, and that, accordingly, proceedings in the civil action would be stayed to allow for arbitration of this issue.

Specification of Error No. 2.

A. Appellant, at no time, agreed to or acquiesced in the arbitration of the issue of whether it obligated itself outside of the terms and provisions of the Subcontract of August 22, 1962 to provide a standby operator for the prestressing of the spiral cases.

Throughout its dispute with Appellee Ets-Hokin, Appellant has steadfastly maintained that in executing the Subcontract of August 22, 1962, it was not obligating itself in any way to perform the cooling or prestressing duties set forth in Paragraph 208(g) of the Contract Specifications. Up until the Arbitration Award, it was also Appellant's understanding that Appellee Ets-Hokin considered the prestressing at least to be an obligation of the Appellant under the said Subcontract. The arbitrators agreed with the Appellant's understanding of the said Subcontract, but, nevertheless, found that Appellant should have, at least, furnished a standby operator for the prestressing because of an oral offer made during the course of contract negotiations (see TR 126, Par. 8; and Transcript of Arbitration Proceedings pages 77-89).

Appellant's now learn, to their dismay, that what was being arbitrated was not just the obligations of the parties as expressed in the various documents making up the written Subcontract agreement of August 22, 1962, but also any obligations, moral, legal or equitable, which the arbitrators deem to have been created during the give and take of subcontract negotiations. The arbitrators could not find in the written Subcontract any acceptance of the Appellant's offer during negotiations to furnish a standby operator, nevertheless, they felt that a properly drawn subcontract should have contained such an item, because of conversations between the parties during subcontract negotiations, and therefore, they were going to set matters right by, in effect, rewriting the Subcontract agreement. And, to sustain this expression of justice, the District

Court below appears to have resorted to the fiction that the issues submitted for arbitration had been broadened by the parties themselves to include any agreements or understandings the parties may have had collateral and prior to the execution of the Subcontract agreement. Appellants are not sure this is precisely what the lower court is saying in its opinion, but if it is, then it is wrong and a gross misinterpretation of Appellant's position on the issues throughout the arbitration proceedings.

The whole legal justification for Appellant's refusal to perform any cooling or prestressing was based on the fact that work was not a part of the written Subcontract. It had sued the Appellee Ets-Hokin on this premise in an effort to recover back-charges. It had asked the Arizona District Court, faced with the inevitability of a Stay Order, to limit the arbitration contemplated by its Order to the Subcontract of August 22, 1962 in a further effort to preserve its asserted rights; and finally, at the outset of the arbitration hearings, it requested that the arbitrators concern themselves solely with the written Subcontract, and, if parol evidence was deemed necessary, that they consider it only as an aid to the interpretation of that Subcontract language which required an explanation of its meaning and intent (see transcript of Arbitration Hearings, Pages 12-16). Thus, to hold, as the District Court below did, that Appellant agreed, or consented, to a broadening of the issues so as to permit an Arbitration Award based on what the arbitrators may have conceived as being the intention of the parties separate and apart from the Subcontract, is an unreasonable interpretation of the Appellant's position throughout the course of arbitration.

The District Court below misrepresents the meaning of Appellant's Statement of the Issues to the Arbitration Board, TR-136, Lines 7-18.

Quoting from Appellant's Statement of Issues, TR 66-69, submitted to the arbitrators at their request prior to the Arbitration Hearing, the lower court concluded, that because Appellant argued for its interpretation of the written Subcontract language by declaring in its statement that "the Subcontract work was clearly *intended* and *understood* by the parties to be the work under Item 79, which was preliminary to CB&I subcontract work for the turbine manufacturer . . .", the Appellant, therefore, included among the issues to be discussed and determined by the Arbitrators the intention and understanding of the parties" apart from and outside of the written Subcontract. To draw such a conclusion from an Argumentative Statement of the Appellant, is to import a meaning or intent to those words which simply did not exist. When Appellant addressed the Arbitrators in its Statement of Issues to the effect that "installation of spiral cases as that term is used in the subcontract does not comprehend cooling and prestressing . . ." because "the subcontract work was clearly intended and understood by the parties to be that work under Item 79 which was preliminary . . ." to certain other work of the Appellant for another contractor, the Appellant, by no stretch of the imagination, was asking the Arbitrator to determine whether or not there were any other agreements between Appellant and Appellee Ets-Hokin other than those set forth in the Subcontract agreement.

By the very act of being called upon to construe a written agreement, the arbitrators were being asked to determine the *intent* and *understanding* of the parties as expressed in the written Subcontract. To place before the Arbitrators the issue of whether the intent and understanding of the parties as expressed in the written Subcontract comprehends prestressing, is not to submit to the Arbitrators the issue of whether there were circumstances existing during the course of Subcontract negotiations which in law, or in

equity, imposed an obligation upon the Appellant to do the prestressing, notwithstanding the intent or understanding of the parties as expressed in the terms and provision of the written Subcontract agreement.

The Arbitrators were not interpreting or construing the written Subcontract when they declared:

> "That the oral offer of furnishing a stand-by operator by a responsible representative of Chicago Bridge and Iron Company to secure a contract should be as binding as the written word, as no evidence was presented of a written acceptance or refusal of this offer."
>
> (TR-126, par. 8).

Here, the Arbitrators were clearly adopting parol evidence produced at the Arbitration Hearing (Transcript of Arbitration Hearings, Pages 81-88), not for the purpose of interpreting or construing the Subcontract language, but for the purpose of imposing an obligation upon Appellant which, admittedly, they did not find in the Subcontract. From this point of view, it is precisely because of this misuse of parol evidence, that we have the Arbitrators making a decision upon an issue not submitted to them.

Again, the lower court cites language used by counsel for Appellant at the Arbitration Hearing (See TR-136 and p. 93, Transcript of Arbitration Proceedings) to justify its conclusion that the issue of whether Appellant was liable to Appellee Ets-Hokin, upon the basis of an oral offer made during the course of contract negotiation was an issue in the Arbitration proceedings. Counsel's remarks were made after it had become quite clear that the Arbitrators were going to receive parol evidence despite Appellant's objections to the effect that parol evidence was unnecessary to construe the Subcontract.

The language of Appellant's counsel cited by the lower court is as follows:

> "I think what is before the Board is what the parties did after the Agreement, and what they did before the Agreement, for the purpose of the Board's making up its mind what the Agreement meant at the time that it was executed."

These remarks were made with specific reference to Paragraph 10 of the printed General Conditions of the Subcontract, which provided in pertinent part as follows:

> "if Subcontractor fails to commence or to prosecute the work required hereunder promptly and diligently . . . Contractor shall have the right if it so elects and without prejudice to any other rights it may have, by giving written notice of its election to Subcontractor to take over all work, or any part thereof . . . and finish the work by whatever method it deems expedient . . . If Subcontractor fails to supply sufficient skilled workmen, suitable materials or adequate equipment, Contractor may, as an alternative to the foregoing remedy, and upon giving the notice above provided, furnish such labor (etc.) . . . and charge the entire cost of furnishing the same . . . to Subcontractor and deduct such costs from any amount payable to Subcontractor."

Appellant's counsel in questioning one of Appellant's witnesses had asked if, prior to Appellee Ets-Hokin's backcharge for prestressing, Appellant had received any written notice of said Appellee's intent to backcharge. The witness answered that no notice had been received. The provisions of Paragraph 10 above were then mentioned, and the witness was asked if the Appellant believed that Ets-Hokin had failed to comply with Paragraph 10. Ets-Hokin's counsel then objected to the questioning on the grounds that Ets-Hokin's compliance or non-compliance with Paragraph 10 was not an issue in the Arbitration, and counsel for Appellant responded to the effect that since parol evidence was being used to construe the Subcontract, the

subsequent actions of Appellee, Ets-Hokin, were relevant to a determination of its understanding of the Subcontract's terms at the time of its execution. In other words, if at the time of execution, Ets-Hokin intended, or understood, the written Subcontract to include prestressing, then, why, when Appellant refused to perform this work, did not Ets-Hokin give the notice required by Paragraph 10? The reference to Paragraph 10 was therefore intended to show that, contrary to its later statements, Ets-Hokin had not understood the Subcontract to include the prestressing obligation, and that its decision to backcharge for it was based upon a construction of the Subcontract arrived at after it had executed the Subcontract, entered into its performance, and discovered it had forgotten to provide for cooling and prestressing in its Subcontract.

Counsel's remarks, therefore, were intended to justify this reference to Paragraph 10 of the Subcontract, as a part of its use of parol evidence to construe the intent of the parties as expressed in the Subcontract. Counsel's remarks certainly do not justify the lower court's conclusion that the issues of the Arbitration were thereby broadened to include the issue contained in Paragraph 8 of the Arbitrator's decision, i.e., whether there was a binding oral agreement outside of the written subcontract.

There is a certain irony in the situation created by the lower court's opinion. The Appellant finds itself in the position of being told that it did the very thing it attempted to avoid throughout the Arbitration proceedings, namely, to expand the issues beyond the confines of the Subcontract document. Indeed, the very Statement of Issues cited by the lower court in support of its conclusion, contained a very precise Statement of the issues before the Board by the Appellant, to wit:

> "The issues to be considered by this Board of Arbitration are as follows:

1. Was Prestressing of the Spiral Cases, as set forth in Paragraph 208(g) of Specifications No. DC-5750, an obligation of CB&I under that portion of Bid Item 79 of the Bidding Schedule incorporated into the subcontract between CB&I and Ets-Hokin dated August 22, 1962?

2. If prestressing of the spiral cases is determined to be a part of the CB&I subcontract work, then the Board must further determine:
(a).....
(b)....."(TR-69)

And, again, in a Hearing Brief submitted to the Arbitrators prior to the Hearing, Appellant, over and over, stressed to the Board that it must concern itself only with the issue of whether there had been a breach of the written Subcontract. For example:

"The first function of the Board, therefore, is to construe the subcontract of August 22, 1962, to read it and to determine, if, upon its face, it is clear and unambiguous, and requires no further explanation with respect to the issue of whether it required CB&I to carry out prestressing..." (TR-80).

"Since the primary duty of the Board is to determine what work the parties intended to cover as that intention is expressed in the language of the subcontract agreement, if that intent can be ascertained from the document itself, then the Board should not proceed to consider other evidence . . .". (TR-81).

* * * * * * *

"In utilizing evidence outside of the written contract for the purpose of determining the scope and meaning of the contract . . . the Board should keep in mind certain instructions which Courts have, over the years, generally deferred to in the construction of written agreements.

* * * * * * *

> Rule II: The Board should make an effort to avoid either modifying the subcontract or creating a new one
>
> Rule III: It, the Board, should not attempt to make a better or more equitable agreement for the parties if, in doing so, they would depart from the specific and clear language of the subcontract
>
> These Rules are really one rule, the thrust of which is to advise the Board as follows: It is not your function to be nice "guys"! Your function is to enforce the agreement as it is written. If the agreement, as written, works out to be more advantageous to one party than the other, it is not your duty to try to balance the equities. In other words, if Ets-Hokin, intending to subcontract the prestressing duty, made an agreement which, by its terms cannot be construed to encompass prestressing, it is not your function to rewrite the contract, so that it does include the function of pre-stressing. If the contract makes sense when "install" is given its ordinary meaning of "to put in place", then, it is not up to you, the Board, to say that to "install" means "to embed" the spiral cases in concrete, or "to do all the work in the completion contract pertaining to spiral cases, in an effort to give Ets-Hokin some relief from its own shortcomings as a negotiator of subcontract work." TR-95, 96.

The irony becomes acute when it is seen that Ets-Hokin itself defined the principal issue in its Statement of Issues to the Board in terms of the written Subcontract, TR 70-76. For example, Ets-Hokin described the terms of the Subcontract pertinent to the prestressing requirement issue, and then declared:

> "This refusal on the part of Chicago Bridge and Iron (to perform the prestressing) raises the first principal issue in this arbitration, namely, was Chicago Bridge and Iron Co. required by its said subcontract with Ets-Hokin to prestress the spiral cases for the eight turbines." (TR-72).

Specification of Error No. 3.

A. The Arbitrators did not find Appellant's oral offer of a standby operator to be an implied covenant or obligation of the Subcontract as inferred by the lower court.

The lower court reasoned that since the *intent* and *understanding* of the parties to the Subcontract was an appropriate consideration of the Arbitration Board, the latter's finding of no evidence of any agreement by Appellant to perform the prestressing was merely a finding of no express written covenant in the Subcontract, thereby inferring that the Board's finding under Paragraph 8 as to the oral offer of a standby operator, was a finding of an implied covenant or obligation.

The Board's judgment was that the evidence before it indicated that CB&I did not agree to perform the prestressing work. This is clearly a statement that neither the subcontract nor the extrinsic evidence presented to the Board confirms an agreement by CB&I to do the prestressing. Thus, the Board is finding that even the oral offer to furnish the standby operator did not constitute an agreement by CB&I to perform an act under the Subcontract.

However, the fact remains that in Paragraph 11 of the Award, the Board found that CB&I should have performed the prestressing, at least to the extent of providing a standby operator; and the reason for this conclusion is set forth in Paragraph 8 of the Award, to wit:

> "That the oral offer of furnishing a stand-by operator by a responsible representative of Chicago Bridge and Iron Company to secure a contract should be as binding as the written word."

Thus, it is not by virtue of any construction of the written Subcontract that the Board is imposing the obligation to prestress upon CB&I, but solely upon the grounds that since

the prestressing was a requirement of the General Contract under the Specifications thereto, TR 125, Par. 6, and since CB&I had, in an effort to secure the contract, orally offered to furnish a standby operator, it, therefore, should be required to do that which at one time it had offered to do.

This is not the use of parol evidence to construe the intent and understanding of the parties as expressed in writing in a Subcontract agreement. This is the use of parol evidence to establish a prior equitable or moral commitment on the part of the Appellant in the nature of an estoppel, even though there was no evidence before the Arbitrators to show that either Appellee's Mr. Bruni, who agreed to the Subcontract, or Appellee's Mr. Lauter, who actually executed the Subcontract, had accepted the oral offer or relied upon it in agreeing to or executing the Subcontract.

Rather than find that the Appellant had agreed under the contract to perform the prestressing, the Board specifically found that the Appellant had expressly excluded many of the duties making up the prestressing obligation as described in subparagraph 208(g) of the General Contract Specifications. In Paragraph 9 of the Award, TR 126, the Board found that CB&I had specifically excluded the installation of any gates, valves, small pipes and other appurtenances. Prestressing calls for the installation of a pressure system which requires the installation of "gates, valves, small pipes and other appurtenances". One cannot find an implied covenant to a written agreement where the express terms of that agreement give rise to an opposite inference.

> "It is only where the expressed contract is silent on a particular point that an implied obligation in such respect can arise. No meaning, terms or conditions can be implied which are inconsistent with the ex-

pressed conditions." 17 AM Jur 2d *Contracts* Sec. 255, p. 652.

The express terms of the Subcontract rule out the performance of part of the prestressing obligation, therefore, no implication can arise from the writing itself that the parties contemplated or impliedly agreed that CB&I should perform the balance of the prestressing obligation, i.e., the furnishing of a standby operator to watch and maintain the pressure in a pressure system to be installed by Ets-Hokin.

To qualify as an implied covenant or obligation of the Subcontract, acceptance of the oral offer to furnish a standby operator must be implicit in the language of the subcontract as it sets forth and expresses the intention and understanding of the parties thereto. Implied covenants are not favored in the law. *Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Company Sales Division Inc.* 39 Cal. Rptr. 767 (1964) "and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made". *Cousins Inv. Co. v. Hastings Clothing Co.* 45 Cal. App. 2d 141 at 143, 113 P.2d 878 at 879.

> "The Courts cannot make better agreements for the parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably. It is not enough to say that without the proposed implied covenant, the contract would be improvident or unwise or would operate unjustly."
>
> *Walnut Creek Pipe v. Gates Rubber Co.* . . supra at 771.

Thus, even had the arbitrators intended to define an implied covenant to the written contract to furnish a standby operator, the normal rules governing the creation of an implied covenant would not permit them to do so in this instance.

But the arbitrators were not so sophisticated as to raise up an implied covenant. The Board was merely expressing its sense of justice, declaring that if CB&I, during the course of contract bargaining, made an offer to perform a certain portion of the general contract as part of an effort to induce the award to it of a subcontract, then it should be bound by the offer. This is a case of the use of parol evidence not to interpret or construe a subcontract, but to impose upon CB&I an obligation separate and apart from the subcontract.

B. The Arbitrators have no power to expand the scope of the Arbitration without the Agreement of the Parties.

The lower court pointed to the informal questions submitted by Arbitrator Corwin to the parties prior to the Arbitration Hearings as an example of the broadened scope of the issues submitted to the Arbitrators for decision. In particular, the Court noted that Mr. Corwin asked: "Was there any discussion between Contractor and Subcontractor about who would perform the prestressing work?", and both parties answered this question. The fact that Appellant answered this question cannot be construed either (1) as a broadening of the issues to include the question of whether Appellant made a binding promise outside of the written Subcontract to perform certain work, or (2) as a consent to or acquiescence by the Appellant to a broadening of the issues presented to the Arbitration Board for decision.

The Arbitrator's questions were in the nature of discovery, a process which permits a wide range of questions without prejudice to the litigating parties. However, to impute to this question the power of broadening the submission of issues to the Board is to give it a power which it does not possess inherently and which would probably surprise even the questioner himself.

To confer upon a question asked in the course of an arbitration the power to alter the subject matter of the arbitration would render the arbitration process perilous to the point of inutility.

The power of the Arbitrators to decide issues rests upon the consent of the parties. 3 AM Jur, *Arbitration and Award Section 10; Lundgren v. Freeman,* 307 F2d 104 (C.A. 9, 1962), albeit even a judicially compelled consent as in this case. If the parties do not knowingly consent to the arbitration of a specific issue, the Arbitrators simply do not have the power to determine this issue and make an Award upon it. Thus, historically, Aribitrators have no authority to deviate from their instructions or "the submission" *McCormick v. Gray* 54 U. S. 26 (1851), and their Award may be set aside if they exceed their authority. *United States v. Farragut* 89 U. S. 406 (1874).

C. The dissent of Arbitrator Elsener rather than support the lower court's conclusion of an implied covenant to prestress in the Subcontract, scores the fact that the Board did not find an implied covenant but a prior obligation separate from the subcontract.

The lower court found that the dissenting arbitrator confirmed the Court's conclusion to the effect that the parties intended for Appellant to do the prestressing work. What Arbitrator Elsener in fact said, when taken in total context, is that the majority of the Board found that in making an oral offer to furnish a standby operator during prestressing operations, the Appellant agreed to do the

prestressing work. If they agree to do the work, as Elsener characterized the Board's decision, then they, the Board, should have found that Appellant ought not to have been backcharged for premium overtime. Elsener's observation merely highlights the fact that the Board was making a finding of an obligation which it did not consider to be a part of the Subcontract. Had it been an agreement under the Subcontract, the Board should have made allowance for the overtime backcharges. Mr. Elsener's characterization of the Board's finding in this respect is more adequately set forth in the first paragraph of his dissent:

> "The finding that an oral offer made by Chicago Bridge & Iron Company to Ets-Hokin to furnish a standby operator should be binding on Chicago Bridge is incorrect. That offer was not accepted by Ets-Hokin either orally or in writing. It has never been my understanding that a party is bound by an unaccepted offer. The offer made by Chicago Bridge was made when it was asking a much higher price, and when the price was reduced I would expect a change in the definition of work as well. Ets-Hokin defined the work when it wrote the contract, and it could easily have provided expressly for Chicago Bridge to do the prestressing, if that had been the agreement. To find that a party shall be bound by a verbal offer made during the usual give and take of contract negotiations where that offer was not referred to again and was not covered by the written contract makes it futile to reduce a contract to writing." (TR-129)

And, indeed, the Award of the Board does show the futility of reducing the intention and understanding of the parties to a writing when the writing, and all reasonable interpretations thereof can be ignored, and a party be held to answer for prior oral offers which were never accepted.

D. The Arbitrators Award constitutes a clear violation of the parol evidence rule, which is merely another way of saying that the Arbitrators exceeded their power.

The lower court has said that the issues before the Arbitrators were broadened to include the intention and understanding of the parties, meaning thereby, apparently, the intention and understanding of the parties separate and apart from the Subcontract agreement. In this, as previously pointed out, the lower court was in error. In referring to the intention and understanding of the parties, Appellant was at all times throughout the proceedings referring to this intention and this understanding as set forth in the Subcontract agreement. This is the reason for Appellant's continuous insistence for strict adherence to the parol evidence rule throughout the Arbitration Hearing and in its memorandums to the Arbitration Board. Under that rule, parol evidence is intended only to explain the intention and understanding of the parties with reference to the written Subcontract.

> "It must be kept in mind, however, that the only purpose for which such evidence is ever admissible in an action on the contract is to interpret the writing. So far as the evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant."
>
> *Williston on Contracts,* Revised Student Edition, Baker Voorhis & Co. 1938, page 499.

Thus, evidence of the prior negotiations of the parties is generally inadmissible where a written subcontract is deemed to have merged all prior oral agreements, as in the instant case. Paragraph 27 of the General Conditions of the Subcontract states:

> "This Subcontract contains all covenants, stipulations and provisions agreed upon by the parties. No agent of either party has authority to make and the parties

shall not be bound by nor liable for any representation promise or agreement not set forth herein. No changes, amendments or modifications of the terms hereof shall be valid unless reduced to writing and signed by the parties."

Thus, the written Subcontract is intended to be a complete integration of the parties' agreement. A prior oral "agreement" therefor is not admissable to show the existence of an independent collateral obligation. It is admissible only to show that the words of the written subcontract bear a particular meaning. *Williston on Contracts,* supra p. 500-01. But the Arbitrators did not find that Appellant's prior oral offer to furnish a standby operator was a part of Appellant's obligation under the written Subcontract to install the spiral cases with test barrel and spider. Instead, they used this parol evidence to find an independent collateral obligation, and, it is precisely because of this that Appellant's say that the Arbitrators exceeded their powers. They were asked to interpret the Subcontract in order to determine if Appellant's refusal to perform the prestressing was a violation of its terms. They did not find that the Subcontract imposed the prestressing obligation on the Appellant; rather they found a prior independent collateral offer by the Appellant which they determined committed the Appellant to furnish a standby operator.

Specification of Error No. 4.

A. The Arbitrators improperly computed the allowable backcharges in that they failed to consider or allow for the evidence submitted by Appellant on the issue of Wages for Standby Operators.

Toward the end of the Arbitration Hearings (Transcript of Arbitration Hearings, p. 276-290, Vol. II), Appellant introduced Ets-Hokin payroll records filed with the Bureau of Reclamation for the period covered by the backcharge

invoices. The purpose of submitting these documents (Exhibit 85 in the Arbitration Hearing) was to demonstrate that Ets-Hokin's backcharge invoices contained employee time records for prestressing which did not match the Ets-Hokin time records for the same employees that were filed with the Federal Government. In other words, time records filed with the government would show that Ets-Hokin employee "A" worked four hours of regular time and two hours of overtime on a certain day, whereas, the backcharge invoice would contain a labor charge showing that on that certain day, the same employee worked four hours regular time and six hours overtime. In preparing Exhibit 85, Appellant's counsel had found some 636 hours of such discrepancies. Prima facie, at least, the documents indicated that Ets-Hokin was overcharging the Appellant in its backcharges. The government records submitted by Appellant were incomplete in that they did not cover all of the relevant backcharge invoices. Appellant did not submit government payroll records for labor charges in connection with the prestressing of Units 3 and 4 in the Glen Canyon Powerhouse.

Appellee's counsel was given an opportunity to examine these records before Appellee's witness, Barna, was cross-examined with respect to their contents. During cross-examination, the discrepancies were explained by the Ets-Hokin Arbitrator, the witness and the counsel for Appellee, as being the result of an IBM system, which required all premium, or overtime, labor to be reflected as regular time, so that the IBM machine could make out the payroll checks. However, this explanation did not clear up the discrepancies. Therefore, Mr. Murphy, the Ets-Hokin Arbitrator, suggested the following:

> "Could we resolve it this way, Mr. Brophy, that your people and the Ets-Hokin people get together and reconcile these differences and then just let the Board know that there either is or isn't a discrepancy?"
>
> (Arbitration Transcript, P. 289)

This suggestion was accepted by both sides. Subsequent to the Hearing, the payroll records were more thoroughly analyzed by the Appellant, and the conclusion reached that the discrepancies did need further explanation. On August 26, 1965, the Appellant's analysis of the payroll was forwarded to Arbitrator, L. A. Elsener, TR 38-47, for examination by the Board with the suggestion that the amounts involved were substantial enough to bear further inquiry by the Board. On September 1, 1965, the Board entered its Award, reflecting therein that the Board had not considered the discrepancies in payroll amounts which, according to CB&I, totaled at least $2,662.08, TR-39, exclusive of the backcharges for Turbines 3 and 4; or, if the Board considered Appellant's evidence, it chose to disregard it in its computation of allowable backcharges.

This disregard, or failure, of the Board constitutes, in Appellant's opinion, a substantial defect in the Award. It means that in calculating the applicable backcharges, the Board did not chose to recognize or resolve evidence which demonstrated on its face substantial error in Appellee's figures.

The lower court simply dismissed this contention of the Appellant by stating that since the evidence was never submitted to the Arbitrators in any verified form, the Arbitrators were, impliedly, under no obligation to consider it, TR-139. Originally, the evidence had been submitted without challenge as to its authenticity. Only its meaning or interpretation was in question, and this was to be worked out between the parties, if possible. The opportunity was never afforded the parties. The Award

was entered before the payroll evidence could have been properly examined by either the Board, or the Appellee. This deficiency should be corrected. Section 11(a) of the Federal Arbitration Act provides for a modification or correction of the Award where there was an evident material miscalculation of figures. Also, Section 10(c) of the Act calls for vacation of the Award where the Arbitrators refuse to hear evidence pertinent and material to the controversy. The record is not clear whether there was merely a miscalculation by or a failure of the Arbitrators to give due consideration to the problem raised by government payroll records. For the Award to be complete this problem should be resolved.

CONCLUSION

1. The Arbitrators exceeded their power in basing their Award upon an oral offer made by the Appellant prior to the conclusion of the negotiations and the execution of the Subcontract in question where there was no showing that the Subcontract required the performance of the offer for its own performance or could otherwise be construed to contain within its terms the obligation to furnish a standby operator.

2. Because the Board exceeded their power thus, in making their Award, the Award should be set aside and the Board directed to award the relief requested by the Appellant.

3. The Board further committed error in computing the backcharges by failing to take into account or consider the Appellant's evidence of overcharges by the Appellee Ets-Hokin.

Respectfully submitted,

RYLEY, CARLOCK & RALSTON

By FRANK C. BROPHY, JR.

Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK C. BROPHY, JR.

(Appendices Follow)

23. ARBITRATION: In case of any dispute between the parties as to the interpretation of this agreement, or as to a change in the Subcontract price or Subcontract time due to the issuance of a change order, or with respect to any other matter arising out of or in connection with this Subcontract or its performance, either party may demand that the dispute be submitted to arbitration. The demand shall be in writing, shall be served on the other party and shall specify the arbitrator chosen by the party making the demand. Within 7 days after receipt of the demand, the other party shall appoint an arbitrator, by written notice served on the party making the demand. The two arbitrators so chosen shall select a third arbitrator. The decision of any two arbitrators shall be binding and conclusive on the parties, shall be in writing and shall be a condition precedent to any right of legal action. In no case shall submission of a matter to arbitration be a cause for delay or discontinuance of any part of the work. Each party shall bear the expense of its own arbitrator, and the expense of the third arbitrator and other costs of the arbitration shall be divided equally between the parties.

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Attorneys for Defendants
Ets-Hokin Corporation and
The Travelers Indemnity Co.

In the United States District Court
for the District of Arizona

PRESCOTT DIVISION

No. Civ. 917 Pct.

United States of America, for the use and benefit of Chicago Bridge & Iron Company, an Illinois corporation,
Plaintiffs,

vs.

Ets-Hokin Corporation, a California corporation, and The Travelers Indemnity Company, a Connecticut corporation,
Defendants.

MOTION FOR STAY OF ACTION PENDING ARBITRATION

Defendants move this Court to stay the above-entitled action and all proceedings herein until an arbitration shall be had in accordance with the terms of the subcontract entered into between the use-plaintiff and defendant ETS-HOKIN CORPORATION.

For grounds of this motion the defendants respectfully represent to this Court as follows:

1. On August 22, 1962, the use-plaintiff entered into and signed a subcontract with defendant Ets-Hokin Corporation, a photostatic copy of which is attached hereto and marked Exhibit "A". The subcontract is in respect to a transaction involving commerce. Article 23 of the General Conditions thereof provides for an arbitration in the event of any dispute between the parties as to the interpretation of the subcontract, or with respect to any other matter arising out of or in connection with the subcontract or its performance.

2. On July 7, 1964, the use-plaintiff instituted the above-entitled action for recovery under the Miller Act. The action involves a dispute between the parties as to the interpretation of the subcontract.

3. On August 14, 1964, by registered mail, return receipt requested, defendant Ets-Hokin Corporation sent a letter to use-plaintiff, a copy of which is attached hereto and marked Exhibit "B," referring to the arbitration clause of the subcontract and requesting an arbitration in accordance therewith. As of the date of filing this motion, use-plaintiff has not responded to said demand for arbitration.

4. Defendants, in support of this motion, have attached hereto Exhibits "A" and "B," as above, and the affidavit of Robert S. Lauter, Executive Vice President of defendant Ets-Hokin, which affidavit is attached hereto and marked Exhibit "C."

Wherefor, defendants herein pray that an order be entered by this Court staying the above-entitled action and all proceedings herein until an arbitration shall be had in accordance with the terms of the subcontract entered into

between the use-plaintiff and defendant Ets-Hokin Corporation.

Dated: August 20, 1964.

FELDMAN & WALDMAN

By /s/ Laurence N. Walker
Laurence N. Walker

LANGERMAN & BEGAM

By /s/ Mark I. Harrison

Attorneys for Defendants
Ets-Hokin Corporation and
The Travelers Indemnity Co.

Copy of the foregoing
delivered this 21 day of
August, 1964 to:

Ryley, Carlock & Ralston
519 Title & Trust Building
Phoenix, Arizona

Langerman & Begam

By /s/ Mark I. Harrison

EXHIBIT B

ETS-HOKIN CORPORATION [Letterhead]
551 Mission St., San Francisco 5, Calif.

Registered
Return Receipt Requested

August 14, 1964

Chicago Bridge & Iron Co.
550 West 17th South Street
Salt Lake City 10, Utah
Attention: Mr. J. G. Daniels

Gentlemen:

This letter constitutes a Demand for Arbitration of the disputes hereinafter referred to arising under the Subcontract between Ets-Hokin Corporation (formerly Ets-Hokin & Galvan, Inc.) and Chicago Bridge & Iron Co., dated August 22, 1962. This demand is made in accordance with Article 23 of the General Conditions of the said Subcontract.

In accordance with said Article 23, Ets-Hokin Corporation hereby informs you that the arbitrator chosen by it is Mr. J. Philip Murphy, whose address is P. O. Box 4335 Bayshore Station, Oakland, California, 94623.

You will note that under the terms of said Article 23 you are required within seven (7) days after your receipt of this Demand to appoint an arbitrator and to serve written notice of the same, identifying your arbitrator, upon Ets-Hokin Corporation.

The disputes as to which Ets-Hokin Corporation demands arbitration are as follows:

1. Whether Chicago Bridge & Iron Co. breached its obligations under the said Subcontract by failing and refusing to perform that portion of Item 79 of the Bidding Schedule for Specification No. DC 5750 of United States Government Contract No. 14-06-D-4429, described in para-

graph 208 g. of said Specification, namely, the cooling and prestressing of the spiral cases for the turbine units, Nos. 1 through 8, of the power house at the Glen Canyon Dam Project, which work was a part of the said Subcontract.

2. Whether as a result of the aforedescribed breach, Ets-Hokin Corporation was entitled under the law and the terms of said Subcontract to do the aforedescribed work and charge the cost to Chicago Bridge & Iron Co.

3. Whether the method used by Ets-Hokin Corporation for doing the said work was reasonable and not in excess of that required.

4. Whether the charges made by Ets-Hokin Corporation against Chicago Bridge & Iron Co. for doing such work were just and reasonable.

5. Whether either Ets-Hokin Corporation or Chicago Bridge & Iron Co. breached its respective obligations under said Subcontract in any other respect.

6. All disputes which are or may by amendment become the subject of Civil Action No. 917 PCT., now pending in the United States District Court, District of Arizona.

Ets-Hokin Corporation will seek a ruling from the arbitrators on all of these disputes.

Very truly yours,

Ets-Hokin Corporation
By Robert S. Lauter
Executive Vice President

cc: Ryley, Carlock & Ralston
519 Title and Trust Building
Phoenix, Arizona

Chicago Bridge & Iron Co.
P. O. Box 4416
Chicago, Illinois 60680

Attention: Mr. H. J. Clarke, President

EXHIBIT "C"

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AMhurst 4-4171

Attorneys for Defendants
Ets-Hokin Corporation and
The Travelers Indemnity Co.

In the United States District Court
for the District of Arizona

Prescott Division

No. Civ. 917 Pct.

United States of America, for the use and benefit of Chicago Bridge & Iron Company, an Illinois corporation,
Plaintiffs,

vs.

Ets-Hokin Corporation, a California corporation, and The Travelers Indemnity Company, a Connecticut corporation,
Defendants.

AFFIDAVIT OF ROBERTS S. LAUTER, EXECUTIVE VICE PRESIDENT OF DEFENDANT ETS-HOKIN CORPORATION

Robert S. Lauter, being duly sworn, says:

1. I am the Executive Vice President of Ets-Hokin Corporation, a defendant herein. On August 14, 1964, I served upon Chicago Bridge & Iron Co., use-plaintiff herein,

by United States mail, registered, return receipt requested, a demand for arbitration of certain disputes arising out of an agreement of subcontract between use-plaintiff and defendant Ets-Hokin Corporation. Said subcontract is attached to use-plaintiff's complaint as Exhibit "A" thereto and to defendants' motion for stay pending arbitration as Exhibit "A" thereto.

2. Ets-Hokin Corporation is a California corporation with its principal place of business in the State of California. Use-plaintiff Chicago Bridge & Iron Company is an Illinois corporation with its principal place of business in the State of Illinois.

3. Ets-Hokin Corporation's prime contract with the United States Bureau of Reclamation in the approximate amount of $7,891,271.70 called for it to construct the powerhouse, install the turbo-generators, and construct the switchyard at the Glen Canyon Dam, Page, Arizona. These facilities would serve to generate hydro-electric power from the harnessing of the Colorado River, an interstate waterway, and distribute it to Arizona, Utah, and probably, in the future, other states as well.

4. Under its subcontract, Chicago Bridge & Iron Company agreed to perform a portion of the work of installing the turbogenerators.

5. In connection with the work on the Glen Canyon Dam Powerhouse, Ets-Hokin Corporation, Chicago Bridge & Iron Company, and other contractors on the project sent numerous supervisory personnel from California and other states into Arizona; several out-of-state subcontractors

were utilized; and substantial amounts of equipment and supplies were required to be moved across state lines.

/s/ Robert S. Lauter
Robert S. Lauter

Subscribed and sworn to before me
this 20th day of August, 1964.
/s/ Hallie Keller
Notary Public in and for the City and
County of San Francisco, State of California.
My commission expires on Nov. 17, 1965.

Appendix B

3. Stay or proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 USCA Sec. 3

9. Award of arbitrators; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award

was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. July 30, 1947, c. 392, Section 1, 61 Stat. 669. 9 USCA Sec. 9

10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 20, 1947, c. 392, Section 1, 61 Stat. 669. 9 USCA Sec. 10

11. Same; modification or correcting; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. July 30, 1947, c. 392, Section 1, 61 Stat. 669. 9 USCA Sec. 11

Appendix C

In the District Court of the United States for the District of Arizona

PRESCOTT DIVISION

Civil Action File No. 917 Pct.

United States of America, for the use and benefit of Chicago Bridge & Iron Company, an Illinois corporation,
Plaintiffs,

vs.

Ets-Hokin Corporation, a California corporation, and The Travelers Indemnity Company, a Connecticut corporation,
Defendants.

COMPLAINT

Use plaintiff alleges:

I.

This action is brought under the terms and provisions of 40 U.S.C. 270 (otherwise popularly known as the Miller Act) and jurisdiction of this Court rests upon such legislative authority and the facts hereinafter alleged which place Use plaintiff's claim within the purview thereof.

II.

On or about August 22, 1962, Use plaintiff entered into a subcontract agreement with defendant Ets-Hokin Corporation, a corporation, (formerly known as Ets-Hokin & Galvan, Inc., a corporation), a copy of which, exclusive of

documents incorporated therein by reference, is marked Exhibit "A" for identification, attached hereto and made a part hereof.

III.

Under the aforesaid subcontract plaintiff has undertaken amongst other items of construction the installation, assemblage and welding of the upper and lower draft tube liners with pier noses and pit liners and the installation of the discharge ring, stay rings and spiral cases with test barrel and spider in connection with the construction of the powerplant, switchyard and appurtenant works at the Glen Canyon Dam at Page, Coconino County, Arizona by defendant Ets-Hokin Corporation, prime contractor under United States Department of The Interior, Bureau of Reclamation contract No. 14-06-D-4429.

IV.

The aforesaid subcontract specifically excluded from the area of Use plaintiff's responsibility in connection with Specification No. DC-5750 of the above contract No. 14-06-D-4429, "any excavation, grouting, concrete work, packing, cleaning or painting, coating, wrapping, felt, tar, electrical, mechanical, structural, turbine, machinery or other general contract work", as well as "the installation of any gates, valves, small pipes or other appurtenances."

V.

Use plaintiff has completed more than 93% of the aforesaid subcontract and is continuing to perform the same.

VI.

In keeping with the terms of said subcontract, Use plaintiff has been billing and receiving subcontract pay-

ments from defendant Ets-Hokin Corporation periodically as the subcontract work has progressed. However, as to sums due and payable and billed prior hereto, defendant Ets-Hokin Corporation, as of May 4, 1964, has retained therefrom and refused to pay to Use plaintiff the sum of $33,167.41 on the grounds and for the reason that said sums represent "backcharges" by said defendant to cover costs of prestressing spiral cases for each hydraulic turbine unit of the said powerplant during the placement and curing of concrete around said spiral cases.

VII.

Use plaintiff is not responsible under its subcontract with said defendant for such prestressing, and therefore, such "backcharges" by said defendant are a breach by said defendant of the subcontract and constitute a wrongful retention by said defendant of monies now due and payable to Use plaintiff under the aforesaid subcontract.

VIII.

Defendant Ets-Hokin has indicated to Use plaintiff that it will deduct further "backcharges" for such prestressing from monies now due and payable and to become due and payable to Use plaintiff under the aforesaid subcontract, and Use plaintiff begs leave of the Court to amend this complaint to include such additional anticipated "backcharges" if and when they are so made by said defendant.

IX.

In compliance with the requirements of 40 USC 270, defendant Ets-Hokin Corporation, a corporation, as principal entered into a payment bond contract with The

Travelers Indemnity Company, a corporation, as surety, in the sum of $2,500,000.00 for the protection of all persons supplying labor and material in the prosecution of the work provided for in the aforesaid Bureau of Reclamation Prime Contract No. 14-06-D-4429. Said bond was and is in effect at all times pertinent herein.

X.

Under the terms of the aforesaid bond, and pursuant to the provision of the said Miller Act, every person who has furnished labor or material in the prosecution of the work provided for in Bureau of Reclamation Contract No. 14-06-D-4429 and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which a claim is made, shall have the right to sue on the aforesaid payment bond for the amount unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sums justly due him.

XI.

More than ninety days have passed since Use plaintiff performed work and furnished material under the aforesaid subcontract for which it has not been paid, exclusive of defendant Ets-Hokin 10% retention rights, and since defendant Ets-Hokin Corporation has failed to make payment as is hereinabove more specifically alleged on account of said defendant's explicit refusal to pay that amount of money to Use plaintiff which said defendant wrongfully retains as alleged "backcharges" and wrongfully refuses to pay to plaintiff.

WHEREFORE, Use plaintiff prays for relief as follows:

1. For leave to amend its Complaint to include additional monies due and payable to Use plaintiff under its subcontract, but retained by defendant Ets-Hokin Corporation as and for backcharges to cover cost of prestressing spiral cases at the Glen Canyon Dam Powerplant, or other alleged costs not properly chargeable to plaintiff.

2. For judgment against defendant Ets-Hokin Corporation in the sum of $33,167.41, or such other greater sum found to be due at time of judgment as and for wrongful backcharges by said defendant.

3. For judgment against defendant The Travelers Indemnity Company in the sum of $33,167.41 or such other greater sum as found to be due at time of judgment as and for wrongful backcharges by defendant Ets-Hokin Corporation.

4. For interest on all of said sums determined to have been wrongfully retained by said defendant Ets-Hokin Corporation from the date such sums became due and payable to Use plaintiff until payment thereof.

5. For such other and further relief as the Court may deem proper.

RYLEY, CARLOCK & RALSTON

By /s/ FRANK C. BROPHY, JR.

Attorneys for Plaintiff
Chicago Bridge & Iron Company

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Phoenix, Arizona 85003